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No. 370.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB AND JACOB GOLDBAUM,

VS.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Counsel deems it a very great honor to have the privilege of filing a brief as *Amicus Curiae* in this case. He is not attorney for *W. S. Webb* or *Jacob Goldbaum*. He is, however, attorney in case of *Frank Stetson, Plaintiff in Error, vs. The United States, Defendant in Error*, No. 3217, in the *United States Circuit Court of Appeals for the Sixth Circuit*, in which case said court postponed

its decision until the constitutionality of the Harrison Act could be heard and determined by this Honorable Court. Hence, the writer will endeavor to assist this Honorable Court in answering the three certified questions.

> "1. *Does the first sentence of Sec. 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physicians' prescription, who have no order blank therefor, and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?*"

It is too plain for any argument that the first sentence of Section 2 of the Harrison Act is an absolute prohibition against selling, bartering, exchanging or giving away any such drugs, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. It is also very plain that no one except those who have registered and paid the annual tax, are entitled to obtain such blanks. Hence, question 1 should be answered in the affirmative.

> "2. *If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?*"

Article 10 of Amendments to the Constitution of the United States provides:

> *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."*

Mr. Justice Holmes, in case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, said:

> *"It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of revenue measure, was right."*

Section 8 of the Constitution of the United States provides what powers Congress shall have. Congress can pass no laws except as expressly authorized by the Constitution. The Legislatures of the states, however, can pass any laws which are not prohibited or in conflict with the State and Federal Constitutions.

Now, by all process of reasoning, if the Harrison Act is only a revenue measure, how can it be contended that Congress should have the power of designating to whom such licensed person may not sell, barter, exchange or give any of such drugs?

In *Hammer* v. *United States Attorney* (1918), 247 U. S. 1. c. 273, Mr. Justice *Day* said:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> *The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.*
>
> *Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,'* said this court

> in *United States* v. *Dewitt*, 9 Wall. 41, 45, '*has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.*' See *Keller* v. *United States*, 213, U. S. 138, 144, 145, 146; Cooley's Constitutional Limitations, 7th Ed. p. 11."

While we do not contend that the power of Congress depends on the action of the Legislature, we respectfully call attention to the fact that the Legislature of the State of Tennessee (Pub. Acts 1st Ex. Sess. 1913, ch. 11), did pass a law prohibiting the sale or distribution of opium or any derivative thereof, with a proviso that a physician may prescribe the drugs when in personal attendance on a patient. Doctor H. B. Hyde was indicted under this Act of (1) an unlawful sale, and (2) an unlawful distribution of morphine, a derivative of opium. He challenged the constitutionality of said Act, by a motion to quash the indictment, which motion was overruled. A verdict of guilty was duly rendered. He filed motion for a new trial and in arrest of judgment, both of which were overruled. He appealed to the Supreme Court of Tennessee, being case of *Hyde* v. *State* (1914), 131 Tenn. 208. *Held*

> "Public Acts 7st Ex. Sess. 1913, ch. 11, prohibiting the sale or distribution of opium or any derivative thereof, except that a physician may prescribe the drugs when in personal attendance on a patient, does not deprive a physician of his liberty or property without due process of law as arbitrarily curtailing his right to practice by prescribing ac-

cording to methods formerly obtaining, *but is a valid exercise of the police power to regulate the sale and distribution of dangerous drugs.*"

In the matter of Yun Queng (1911), 159 Cal. 508, the petitioner was arrested and detained on a charge of violating Statutes of California, 1909, page 422, entitled, "An Act to regulate the sale and use of poisons in the State of California, and providing a penalty for the violation thereof." He applied for a writ of *habeas corpus. Held,*

> *"When it is determined that any act is within the police power of the state, nothing further need be said. The rest is left to the discretion of the law-making power in the exercise of that plenary power in the state, which enables it to prohibit all things hurtful to the public welfare.*
>
> *Opium is an active poison, which has no beneficial use except as a medicinal drug; and its unrestricted use would have a debasing and harmful effect on the moral and economic welfare of a large portion of our population; and the act which permits its use under all circumstances, while otherwise prohibiting its possession, is a valid regulation within the general police power of the Legislature."*

In case of *Meffert* v. *The State Board of Medical Registration and Examination* (1903), 66 Kan. 710, 72 Pac. 247, the Supreme Court of Kansas held:

> "The clause in the Fourteenth Amendment to the Constitution of the United States 'Nor shall any state deprive any person of life, liberty, or property, without due process of law,' *is not a limitation upon the police power of the state to pass and enforce such laws as in its judgment will inure to the health, morals and general welfare of its people.*"

This Honorable Court affirmed this case (1904), *Meffert* v. *Packer et al.*, 195 U. S. 625.

District Judge West, in case of *The United States* v. *C. T. Doremus*, on January 2, 1918, in a very able opinion, held that the Harrison Act is unconstitutional. The Government sued out a writ of error, and said cause is now *The United States of America* v. *C. T. Doremus*, No. 367. Judge West's opinion is printed in the transcript of record, and is so full of sound reason and common sense that it ought to be adopted as the opinion of this court.

Mr. Willis Reed Bierly in "Police Power State and Federal," says:

> "To comprehend the delimitation between Federal and State police power, it is necessary to keep in view the distinction between the Federal and State Constitutions. In the Federal Constitution all powers not conferred by the states are reserved to the states, in addition to those powers expressly reserved. (1) In a State Constitution all powers not reserved therein from the domain of legislation are conferred upon the legislative power. (2) Thus, there, the Federal power is supreme and the state power must give way, in all cases where Congress and the president are expressly given control of the subject matter, and such power may be exercised anywhere within the United States or its territories. *And, on the other hand, with respect to the subjects not granted to the United States, the states severally are supreme within their respective jurisdictions.*" (Sec. 1, ch. 2.)

The United States Circuit Court of Appeals for the Seventh Circuit, in case of *Blunt* v. *The United States*,

recently held that this part of Section 2 is unconstitutional, in that

> *"this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the states."*

This case was heard before *Baker, Mack,* and Kohlsaat, Circuit Judges. Judge Kohlsaat concurred in such conclusions, but died before the opinion was prepared. A petition for a rehearing has been filed.

The United States Circuit Court of Appeals for the Eighth Circuit, in cases of *J. H. Hughes, Plaintiff in Error,* v. *United States of America,* and *U. S. G. Hughes, Plaintiff in Error,* v. *United States of America,* upheld the law. Petitions for rehearing have been filed.

Accordingly, we respectfully submit that it will not be necessary to consider the third question, conditionally submitted.

Respectfully submitted,

FRANS E. LINDQUIST,
*Amicus Curiae.*

Kansas City, Mo.
Dec. 17-'18.